98-5864

No. 97 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

TOMMY DAVID STRICKLER,

Petitioner-Appellant,

v.

RONALD ANGELONE, Director,
Virginia Department of Corrections,

Respondent-Appellee.

On Petition For A Writ of Certiorari To the
Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Scheduled
September 16, 1998

Mark E. Olive
Virginia Capital Representation
Resource Center
1001 East Main Street, #510
Richmond, VA 23219
(804) 643-6845

Barbara L. Hartung
(Counsel Of Record)
1001 East Main Street
Suite 504
Richmond, VA 23219
(804) 649-1088

Counsel For Petitioner

43 pp

CAPITAL CASE

QUESTION PRESENTED

Whether the government's duty under the Due Process Clause and Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, to disclose favorable evidence to the defense is limited by a due diligence exception imposed on defense counsel. If so, is the due diligence exception applicable only to evidence readily available to the defense in a public forum.

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Tommy David Strickler ("Petitioner"), a Virginia capital inmate, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, reversing the district court's grant of his petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unpublished and is reprinted at Appendix A. The unpublished opinions of the United States District Court for the Eastern District of Virginia, Richmond Division, appear at Appendices B, C, and D.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was issued on June

17, 1998, and the petition for rehearing was denied on July 14, 1998. A motion to stay the mandate and for a stay of execution was denied on July 30, 1998. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution provide in relevant part:

> No person shall be . . . deprived of life liberty, or property, without due process of law [.]
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves portions of Virginia's capital and habeas statutes, see Va. Code Ann. sections 8.01-654.1-6, 18.2-31, 19.2-264.2, and Va. S. Ct. Rules 3A:11(b)(2) and 4:1(b)(5), reprinted in Appendix E.

STATEMENT OF THE CASE

On January 5, 1990, Leanne Whitlock disappeared along with the blue car she had borrowed from her boyfriend, John Dean. On January 13, 1990, her nude body was discovered in a wooded area in Augusta County, Virginia. She died from multiple head fractures.

A. Procedural History

i) The Trial and Sentence: Strickler was arrested on January 11, 1990, and, based on his possession of Dean's car, charged with grand larceny in neighboring Rockingham County. The prosecution was later transferred to Augusta County. On February 27, 1990, Strickler was indicted in the Circuit Court of Augusta County on one count of abduction and one count of

robbery. JA 20-23[1]. On April 23, 1990, he was indicted for the capital murder of Whitlock during the commission of "robbery, rape or abduction with the intent to extort money or a pecuniary benefit." JA 20. Va.Code sec. 18.2-31.

In June, 1990, Strickler was tried by a jury and convicted of capital murder, robbery, and abduction. JA 1278-80. The jury sentenced Strickler to death based on the two statutory aggravators--future dangerousness and vileness. Va.Code. sec. 19.2-264.2. The court imposed the death sentence on September 19, 1990, in addition to two life sentences for robbery and abduction.

A co-defendant, Ronald Henderson; was charged with the same offenses in separate indictments but had not been arrested prior to Strickler's trial. Henderson was apprehended after Strickler's conviction and was granted a change of venue. Henderson was tried in March, 1991, convicted of first degree murder, and sentenced to life. JA 1086.

ii) The Direct Appeal: The Virginia Supreme Court affirmed the conviction and sentence on direct appeal on April 19, 1991. Strickler v. Commonwealth, 404 S.E.2d 227 (Va. 1991). Petition for certiorari was denied. Strickler v. Virginia, 112 S. Ct. 386 (1991).

iii) The States Habeas Proceedings: Strickler filed a state habeas petition with the Circuit Court of Augusta County. JA 467-517. The court denied all motions for expert and investigative assistance and dismissed the petition without an evidentiary hearing in September, 1993. JA 638-41. The Virginia Supreme Court granted a limited appeal on trial counsel's failure to object to the defective jury instruction on capital murder. The instruction included a predicate offense--abduction with intent to defile--that did not by statute support a capital conviction. Finding no prejudice from counsel's performance, the Court affirmed the denial of the writ. Strickler v. Murray, 452 S.E.2d 648 (Va. 1995). Petition for a writ of certiorari was denied. Strickler v. Angelone, 116 S. Ct. 146

[1] "JA" refers to pages of the Joint Appendix filed in the United States Court of Appeals.

(1995).

iv) Federal District Court Proceedings: On May 20, 1996, Strickler filed an amended federal habeas petition in federal district court. JA 705-835. A motion to dismiss was filed in June, 1996. On December 10, 1996, the district court granted an evidentiary hearing on eight claims and dismissed the remainder. App. B; JA 944-74. On a motion for reconsideration, the district court dismissed five additional claims and reaffirmed the grant of a hearing on the claims of ineffective assistance of counsel, suppression of Brady material, and denial of due process and a fair trial on January 16, 1997. App. C; JA 990-94. Strickler conducted discovery in preparation for the hearing. Based on the evidence produced, Strickler moved for summary judgment on his Brady and fair trial claims. JA 995-1057. The Warden submitted a cross-motion for summary judgment alleging procedural default and opposed Strickler's motion on the merits. JA 1058-65. On October 15, 1997, the district court granted Strickler's motion for summary judgment on both claims and vacated his conviction and death sentence. App. D; JA 1233-56.

v) The Decision Of The Fourth Circuit Court Of Appeals: Respondent appealed to the United States Court of Appeals for the Fourth Circuit. That Court reversed the district court. Strickler v. Pruett, No. 97-29 (June 17, 1998). Petitioner's motion for rehearing and suggestion for rehearing en banc were denied on July 14, 1998. App. A. His motion to stay the mandate and for a stay of execution was denied on July 30, 1998. App. A. Petitioner is scheduled to be executed on September 16, 1998.

B. FACTS OF THE CASE

i. The Relevant Trial Testimony

Anne Stoltzfus testified that she witnessed the abduction of Whitlock from the parking lot of a Harrisonburg shopping mall. On January 5, 1990, Stoltzfus went to the mall with her daughter.

JA 92. Around 6 p.m. she saw two men and a woman at the Music Land store. One of the men was "revved up" and impatient. JA 93. She described the physical features of the three and their clothing. JA 94-96. Stoltzfus left the store, saw the trio inside the mall, and spoke briefly to the woman. JA 96. Shortly thereafter, Stoltzfus and her daughter were in their car and stopped in the parking lot when a car came by. Stoltzfus described the driver, a black woman, as "a rich college kid," "beautiful," "well dressed," "happy," "singing" and "bright eyed." JA 99. Stoltzfus got a good look at her and identified the driver as Whitlock. JA 99-100.

Whitlock pulled in front of Stoltzfus and stopped for traffic. The "revved up" man from the music store, whom Stoltzfus later identified as Strickler, came out of the mall and banged on vehicles in front of Whitlock's car. He then pounded on Whitlock's passenger side window, yanked the car door open, and sat facing her. She tried to push him away. JA 102-03. The second man, later identified as Henderson, and the blonde woman, seen earlier in the mall, tried to enter the car. Whitlock accelerated and "laid on the horn." JA 103. Strickler hit Whitlock repeatedly on her shoulder and head. The car stopped, Strickler opened the passenger door, and the other two got into the back seat. JA 103. The Henderson handed his coat to Strickler who put it on the floor and "fiddled with it [for] what seemed like a long time." JA 104. Whitlock was "totally frozen." JA 104.

Stoltzfus pulled parallel to Whitlock's car, got out, and walked over to look. Henderson "laid over on the seat to hide from me." JA 105. Stoltzfus returned to her car, faced Whitlock, and then asked her three times "Are you O.K." Each time Whitlock looked at Stoltzfus and then looked down to her right. JA 105. Whitlock mouthed a word that Stoltzfus did not understand. She then realized Whitlock had said "help." JA 106. Stoltzfus pulled away and told her daughter to go inside the mall and get mall security. The daughter refused. JA 106. Whitlock drove past Stoltzfus very

slowly, "went up over the curb . . . so the car really tilted," and "laid on the horn again." JA 107. Stoltzfus told her daughter to write the license number on an index card. Stoltzfus remembered the plate, West Virginia NKA 243, with a trick, "No Kids Alone 243." JA 108. Whitlock drove off onto Route 33. Stoltzfus went home and never called the police. JA 109-110. At trial, she identified police photographs of the blue car Whitlock had been driving. JA 108.

The prosecutor argued that Stoltzfus' testimony established Strickler's commission of abduction and armed robbery, predicates to capital murder. JA 438-39. Stoltzfus repeated her testimony at Henderson's trial several months later.

Although Stoltzfus claimed to have witnessed this dramatic event, she never contacted the police despite massive media coverage of Whitlock's disappearance, the discovery of her body, Strickler's arrest, and an interstate search for Henderson. Based on a tip, Stoltzfus was first interviewed two weeks after Whitlock's disappearance by Det. Claytor of the Harrisonburg police. Claytor prepared notes and reports of his interviews. In addition, Stoltzfus sent Claytor letters and notes she prepared after meeting with Claytor. JA 1010-11. Throughout state court proceedings, these documents were never disclosed but were held in the Harrisonburg police files. As detailed below, they contained exculpatory and impeachment material.[2] Stoltzfus refused to meet with Strickler's investigator before trial. JA 1195-96. Her trial testimony contained no hint that she had given contradictory statements to the police.

ii) The Stoltzfus Materials

Stoltzfus' statements and writings to Claytor contradicted her trial testimony in material respects.

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[2] The documents were discovered by federal habeas counsel in 1996 pursuant to an Order of the district court permitting counsel to examine and copy all police and prosecution files. A change in state habeas law barred Strickler from presenting his Brady claim to the state court. Va. Code sec. 8.01-654.1.

a) Exhibit 1 is a one page document containing Claytor's handwritten notes of his initial January 19, 1990 interview with Stoltzfus. JA 1031. The notes read in part:

Can't ID B/F
1st W/M
Can ID W/F 5'05" - 140 (little overweight) Blue Jean
brown shoulder Plain Face (Pail)
2d W/M Tall - Dark Hair
Cream Jacket

In her trial testimony, Stoltzfus contradicted her initial account to Claytor stating: "I gave detailed descriptions of the three persons[.]" JA 118. Yet in her initial interview she could not identify Strickler, describe him or his clothing, or describe the black female. At trial, she also described the black female in detail. At trial, she could not identify the white female. JA 120. Stoltzfus's trial description of the second white male was radically expanded and embellished. JA 93-94.

b) Exhibit 2 is a six page, typed report of Claytor's interviews with Stoltzfus. JA 1033-38. The report of interviews on January 19 and 22, omitted the statement in Exhibit 1 that Stoltzfus could not identify the black female and the first white male. It indicated Stoltzfus was "not sure" if she could identify the two white males but that she could identify the white female. JA 1035. At trial, she testified that she was "one hundred percent sure" of her identification of Strickler. JA 117. She testified that she "picked [the] two [men] with absolute certainty and the third [person] with a slight reservation." JA 117. The report contained no description of the clothing of the black female or of the first white male and stated only that the second white male had a cream colored jacket.

Contrary to her trial testimony and Exhibit 1, Stoltzfus claimed she might have seen the same white female and one white male inside the mall before the abduction, but said nothing about an encounter with the blonde woman and two white males in the music store. Stoltzfus did not recall the license number of the car, saying only that it was dark blue with West Virginia tags. When

shown photo spreads by Claytor, Stoltzfus had stated only that Strickler and Henderson "resembled" the men she saw.

Exhibit 2 also stated that Stoltzfus was taken to the police impound lot on January 24, 1990, and shown the car Whitlock had been driving. JA 1037. The next day, Stoltzfus advised the police that she now recalled the license number, NKA-243, and "had made up a quote to help remember the license number after the incident, 'No Kids After 2-43.'" Stoltzfus also told Claytor that although her daughter had been with her at the mall, the daughter did not see anything. JA 1035.

c) Exhibit 3 entitled "Observations" with diagrams of the abduction was given to Claytor by Stoltzfus on January 19, 1990 at 1 p.m. JA 1040-41, 1186. She did not describe the black female, her clothing, or the first white male other than "scroungy bum-type, W.Va. hick with long scraggly blondish hair." Stoltzfus described a dark blue, new sports car with West Virginia tags but gave no license number. She said nothing about the black female mouthing the words "help" or any suggestion that the first white male had a weapon. Stoltzfus did not report that she got out of her vehicle to speak to Whitlock.

d) Exhibit 4 is a typed letter, dated January 22, 1990, to Claytor and signed by Stoltzfus. JA 1043-45. The letter contradicted her subsequent trial testimony. Stoltzfus stated that she initially had no memory of being at the mall on the night of Whitlock's disappearance:

> I want to clarify some of my confusion for you. First of all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me jog my memory. [JA 1043].

Her "memories" were based on her daughter's recollections. Stoltzfus related her visit to the record store in the mall but omitted any mention of the encounter with Strickler, Henderson, and the unidentified blonde woman that she testified to at trial. JA 1044. The letter contains no description

of the features or clothing of the black female, the two white males, or the unidentified white female.

Stoltzfus admitted that she was not certain the man she saw inside the mall with the white female was the same man who later forced his way into the victim's car. Stoltzfus was also very uncertain of what she "saw" in the parking lot, in direct contrast to her trial testimony:

> I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. then the guy I saw came running up to the black girl's window? Were those 2 memories the same person?
>
> I'm sorry my initial times were so far off. First I remembered it being dark and remembered driving on past Leggetts and not going in. I placed the time around 9:00 pm thinking I must have not gone in because the Mall was closing. Later I thought I hadn't gone into the Mall because I made no purchases. Katie remembered the small Centerpoint purchase and I knew that if that happened January 5 I could trace our path from there. [JA 1045].

Stoltzfus did not report the car's license number or her trick for remembering it. Exhibit 4 contained both exculpatory and impeachment material that was not contained in any other document.

e) Exhibit 5 is an undated, typed document entitled "Notes for Det. Claytor: My Impressions of The Car (Anne Stoltzfus)." JA 1047. This document contained no information about the license plate or license number. The car was described as "dark blue(navy) and shiny," American, and "about the size of a Buick Skyhawk." It was no longer a sports car. Stoltzfus "think[s] it was a two-door" but was not sure.

f) Exhibit 6 is a handwritten note to Det. Claytor from Anne Stoltzfus dated 1-25-90, 1:45 a.m. JA 1049. Stoltzfus reported that she spent "several hours" with Whitlock's boyfriend viewing photographs of Whitlock and was now certain Whitlock was the black girl Stoltzfus saw on January 5, 1990. Her identification and description at trial were probably based on these photographs and not on any "memory" of January 5, 1990.

g) Exhibit 7 is a typed letter (2 pages) dated January 26, 1990, to Det. Claytor and signed

by Anne Stoltzfus. JA 1051-52. This letter contained Stoltzfus's first description of the encounter with the two white males and the unidentified female at the music store and her first description of the clothing of the first white male. Stoltzfus reported that six to eight people in the mall and a couple people in the parking lot witnessed Whitlock's abduction. The letter concludes:

> Thank you for your patience with my sometimes muddled memories. I know if I believed at the time that I was witnessing a crime I would have much, much more vivid memories. I really didn't believe that's what I saw until I saw Leanne's pictures. In fact, I'm sure that if Kim Davis hadn't called the police and that other detective hadn't come to JMU and asked me to come in and talk to you, I never would have made any of the associations that you helped me make. [JA 1052.]

The January 26, 1990, letter directly contradicted the January 22, 1990 letter and was inconsistent with the contents of her initial interviews with Claytor. The letter graphically demonstrated how her testimony evolved into that given at Strickler's trial.

h) Exhibit 8 (3 pages) is a typed document, undated, signed by Anne Stoltzfus entitled "Details of Encounter With Mountain Man, Shy Guy & Blonde Girl." JA 1054-56. This document expanded on the January 26th letter and contained additional details that were ultimately included in Stoltzfus's trial testimony. Stoltzfus reported that once everyone was in Whitlock's car, the second white male transferred his coat to the first white male who was seated next to Whitlock and he "fooled with it for a while." For the first time, Stoltzfus claimed she got out of her car and walked over to Whitlock's car to speak with her. For the first time, Stoltzfus reported that her daughter wrote the West Virginia license number, NKA-243, on a card that Stoltzfus later threw away. For the first time, Stoltzfus reported that Whitlock directed her eyes towards her side on three occasions, and Stoltzfus wondered if there was a gun or knife held to her side. Stoltzfus reported seeing a picture of the car in the newspaper after learning of Whitlock's disappearance but claimed that she had not associated these facts with the events she witnessed. At trial, she denied seeing any news accounts of Whitlock's disappearance. JA 114, 119.

iii) The State's Failure To Disclose Under Brady

Strickler, and later Henderson, were prosecuted by the Augusta County Commonwealth's Attorney, Lee Ervin. Ervin had an "open file" policy. Defense counsel for both Strickler and Henderson reviewed Ervin's files. The Stoltzfus materials were not in Ervin's files when counsel reviewed the files prior to the June, 1990, and March, 1991, trials. JA 1023-29; 1086-89. Counsels' cross examination of Stoltzfus at Strickler's trial, and later Henderson's, did not employ any of the Stoltzfus materials. JA 110-26; 1138-50. Counsel would have used these materials to impeach Stoltzfus if they had been available. JA 1024, 1088.

The prosecutor, Ervin, admitted during federal habeas discovery that he had never seen five of the documents. He did have three of the documents prior to the two trials. Ervin believed the three documents (exhibits 2, 7, and 8) had been in his "open" file for counsels' examination and copying. JA 1190-93.

In state habeas, Strickler argued in part that his counsel had been ineffective for failing to make a formal, pretrial Brady motion. JA 472. The Commonwealth responded that all Brady materials had been in the prosecutor's "open file" and that counsel had been given everything Brady required:

> From the inception of this case, the prosecutor's files were open to the petitioner's counsel. Each of the petitioner's attorneys made numerous visits to the prosecutor's offices and reviewed a[l] [sic] the evidence the Commonwealth intended to present . . . Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal motion. The petitioner has failed to proffer any exculpatory or favorable evidence of which trial counsel were unaware.
>
> * * *
>
> Nor, when counsel in fact obtained all the information to which they were entitled under Brady, can [Strickler] show prejudice.

JA 542-43 (emphasis added). In state habeas, the Warden also submitted the sworn affidavit of Strickler's trial counsel, Bobbitt and Roberts, who stated that "the prosecutor's office . . . gave us

full access to their files and the evidence they intended to present. We made numerous visits to their office to examine these files[.]" JA 611. Thus, the Warden persuaded the state habeas court to deny a hearing on the ineffectiveness claim, where the documents might have been disclosed, based on the representation that all Brady material had been provided to trial counsel and a pretrial Brady motion was unnecessary.

As Strickler had no access to or knowledge of the Stoltzfus materials, he did not present any state habeas claim based on their suppression. Strickler had moved for the appointment of an investigator and various experts to assist in the development of his state habeas petition. JA 624. The Commonwealth opposed these motions arguing that there was no right to such assistance in state habeas. JA 627-35. The petition and all motions were denied without a hearing. JA 638-41.

iv) The District Court Grants The Writ

In federal habeas, Strickler alleged for the first time that his constitutional rights under Brady v. Maryland, 373 U.S. 83 (1963), were violated by the state's suppression of the Stoltzfus materials. JA 787. The district court held that Strickler had demonstrated cause for his failure to raise the claim in state court. App. B at 23-24. The district court found that Strickler "had no independent access to this material and the Commonwealth repeatedly withheld it throughout Petitioner's state habeas proceedings." App. C at 4.

The district court found that five documents (exhibits 1, 3, 4, 5, and 6) were never disclosed to defense counsel or to the prosecutor[3]. App. D at 18-19. These documents remained in a nonpublic file of the Harrisonburg police throughout state court proceedings. Id. at 16-17. The prosecutor had an open file policy during both Strickler's and Henderson's trials and defense counsel

[3] The district court concluded that it need not resolve the dispute concerning exhibits 2, 7 and 8, where the failure to disclose the remaining five documents constituted a Brady violation. JA 1244.

had "full access" to that file. Claytor recalled distributing only exhibit 2 to the Rockingham prosecutor and had no recollection of distributing any of the other documents. Id. at 18. In view of these facts, the district court found that the recollections of Strickler's co-counsel, Roberts, concerning possible knowledge of the contents of Stoltzfus' documents were "much too vague and insufficient to create a genuine dispute" about the disclosure of these five documents. Id. at 20. The district court also found that a newspaper story on June 17, 1990, containing a pretrial interview with Stoltzfus "contain[ed] virtually none of the information contained in the Stoltzfus materials[.]" Id. at 21. The district court found that the Warden had "not offered evidence to show that the abundance of information in the Stoltzfus materials were provided to Strickler or would have been available to him through diligent investigation." Id. The district court found that the prosecutor was on notice that several separate police departments and jurisdictions had investigated the Whitlock murder and that relevant materials might be contained in their files. As a result of the state's actions, the five Stoltzfus documents were never disclosed to Strickler. These factual findings are not clearly erroneous.

The district court found that the Stoltzfus materials contradicted or impeached the witness's trial testimony "in many crucial respects." Id. at 6. The court concluded that the documents taken as a whole provided "potentially devastating impeachment material, casting doubt on her testimony." Id. at 11. The Commonwealth had argued at trial that Stoltzfus, the only eyewitness, established both the abduction and armed robbery predicates for the capital murder count. The district court held that the documents were material under Brady and rejected the Warden's argument that Stoltzfus' testimony was irrelevant to Strickler's conviction. Id. at 11-15. The district court granted Strickler's motion for summary judgment on the Brady claim and the denial of a fair trial claim, vacating his conviction and sentence. The Warden appealed.

v) The Court Of Appeals Reverses

The Court of Appeals excused the prosecutor's failure to disclose the Stoltzfus materials first at the time of trial and later during the state habeas proceedings. The Court held that Strickler had procedurally defaulted the claim when he had failed to file a discovery motion in state habeas for production of the Harrisonburg police files, citing Va.S.Ct. Rule 4:1(b)(5).[4] Because state habeas counsel did not exercise the "reasonable diligence" required under Brady, Strickler "cannot establish cause [to excuse default] based upon the unavailability of the Brady claim." App. A at 13, 21-22. The Court also rejected Strickler's argument that trial counsel was constitutionally ineffective when he failed to make a Brady motion at trial, thus demonstrating cause. Given the prosecutor's open file policy, "trial counsel were under no obligation to file a Brady motion." Id. at 23. Finally, the Court concluded that the documents were not "material" because there was no "'reasonable probability' of a different result" if they had been disclosed. Id. at 23-24.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision conflicts with that of every other Circuit Court of Appeals, decides important federal questions in ways contrary to decisions of this Court, and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Strickler presents the classic Brady scenario--material impeaching a key prosecution witness held in privileged, undisclosed police files. The Fourth Circuit's decision limiting the State's obligation to disclose exculpatory evidence to those circumstances in which the defense could not have obtained the evidence itself, under any scenario, is irreconcilable with this Court's recent

[4] The State did not rely on this Rule in the district court or on appeal. The Rule was raised by the Fourth Circuit sua sponte in its decision.

restatement of established law in Kyles v. Whitley, 115 S. Ct. 1555 (1995). The Court below has abandoned the principle that prosecutors should be encouraged to disclose favorable evidence, thereby "preserving the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations [citation omitted]," id. at 1568, in favor of a rule that insulates prosecutors from the consequences of their decisions to suppress evidence provided some method by which the evidence might have been obtained by the defense can be constructed.

In adopting this rule, the Fourth Circuit decided a question that has split the Circuits--whether there is a "due diligence" exception to Brady--in a way that goes far beyond the limits imposed by any Circuit that recognizes the exception.

I. THE FOURTH CIRCUIT'S "DUE DILIGENCE" EXCEPTION TO THE STATE'S DUTY UNDER THE DUE PROCESS CLAUSE TO DISCLOSE EXCULPATORY EVIDENCE, BASED ON UNSUPPORTED SPECULATION THAT THE STATE HABEAS COURT MIGHT HAVE ORDERED DISCLOSURE OF PRIVILEGED POLICE DOCUMENTS UNKNOWN TO AND UNAVAILABLE TO THE DEFENSE, CONFLICTS WITH THE DECISIONS OF EVERY OTHER CIRCUIT AND WITH THIS COURT'S DECISIONS.

The Courts of Appeal in nine circuits have held that a "due diligence" exception exists to the State's obligation under the Due Process Clause to disclose exculpatory evidence to a criminal defendant. Each of those Circuits, except the Fourth Circuit, has limited that exception to cases in which the evidence was known by or fully available to the defense or in which the defense actually had all the information needed to produce the evidence itself. See Lugo v. Munox, 682 F.2d 7, 9-10 (1st Cir. 1982); United States v. Payne, 63 F.3d 1200, 1208-09 (2d Cir. 1995); United States v. Perdomo, 929 F.2d 967, 973 (3d Cir. 1991); Westley v. Johnson, 83 F.3d 714, 725-26 (5th Cir. 1996); United States v. Todd, 920 F. 399, 405 (6th Cir. 1990); United States v. Morris, 80 F.3d 1151, 1170 (7th Cir. 1996); United States v. Davis, 785 F.2d 610, 618 (8th Cir. 1986); United States v. Brown, 562 F.2d 1144, 1151 (9th Cir. 1977); United States v. Valera, 845 F.2d 923, 927-

28 (11th Cir. 1988).

Two Courts of Appeals, the D.C. and Tenth Circuits, have explicitly rejected the idea of any such exception. Banks v. Reynolds, 54 F.3d 1508, 1517 (10th Cir. 1995); United States v. Agurs, 510 F.2d 1249, 1253 (D.C. Cir. 1975)(*citing*, Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966)), *rev'd on other grds*, 427 U.S. 97. Two other Circuits, the Seventh and the Ninth, have conceded the logic of that position, while adopting a highly restrictive rule of "diligence" to avoid blatant "gamesmanship" by defendants. United States v. Hedgeman, 564 F.2d 763, 768 (7th Cir. 1977); United States v. Shelton, 588 F.2d 1242, 1250 (9th Cir. 1978). In reality, there is little difference in the positions of these two Circuits and of the D.C. and Tenth Circuits. Based upon the resulting lack of materiality, the Tenth Circuit has also held that no constitutional violation occurs where the defense actually has the evidence. *Compare*, Banks, 54 F.3d at 1517, *with* United States v. Davis, *supra*, and United States v. Brown, *supra*. Thus, eleven Circuits have addressed an important constitutional issue with significantly varied results.

Petitioner urges that certiorari should be granted for three independent reasons. First, the adoption of a "diligence" exception by a majority of the Courts of Appeals is fundamentally inconsistent with this Court's Brady jurisprudence. Second, the breadth of the exception adopted in this case by the Fourth Circuit is without precedent. Third, contrary to the decision below, the burden of demonstrating the applicability of any such exception must fall on the government.

A. There Is No "Due Diligence" Exception To The State's Duty To Disclose Exculpatory Evidence.

The decision in this case effectively destroys a constitutional right that seemed long settled. Although this Court in Kyles v. Whitley, 115 S. Ct. 1555 (1995), provided a comprehensive review of the applicable law, it made no mention of a "due diligence" exception. According to Kyles, if the evidence is exculpatory and material, it must be disclosed. Id. at 1565.

> Bagley held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Id. (emphasis added), *quoting*, United States v. Bagley, 473 U.S. 667, 682. In each of its cases, this Court has set forth the rule in unambiguous terms, *e.g.*, Brady, 373 U.S. at 87; Bagley, 473 U.S. at 669, *quoting*, Brady, *supra*, further addressing only the question of what, if any, action by the defendant is required to trigger the State's obligation and clarifying the definition of materiality. *See, discussion*, Kyles, 115 S.Ct. at 1565.

None of this Court's decisions has said, much less held, that the prosecution's duty is affected by the prospect that the defense might be able to find the evidence itself.[5] As the Tenth Circuit held:

> ... the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge. Simply stated, "[i]f the prosecution possesses evidence that, in the context of a particular case is obviously exculpatory, then it has an obligation to disclose it to defense counsel whether a general request is made or whether no request is made." Smith v. Secretary of N.M. Dep't of Corrections, 50 F.3d 801, 826 (10th Cir. 1995); Bagley, 473 U.S. at 682[] (Blackmun, J.); id. at 685[] (White, J.). In this case, the fact that defense counsel "knew or should have known" about the Dean/Hicks information, therefore, is irrelevant to whether the prosecution had an obligation to disclose the information. The only relevant inquiry is whether the information was "exculpatory."

Banks, 54 F.3d at 1517 (emphasis added).

Only the First Circuit has even attempted to ground the "due diligence" exception in this Court's jurisprudence, citing language in United States v. Agurs, 427 U.S. 97, 111 (1976). See Lugo, 682 F.2d at 9-10. That Court's reliance on Agurs, however, was clearly misplaced.

In Agurs, this Court noted that the standard for Brady claims differs from that for newly

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[5] In Agurs, 427 U.S. at 102, the Court did note that the Court of Appeals "found no lack of diligence on the part of the defense ...." It did not comment on this further, however, and the issue of defense diligence played no role in its decision.

discovered evidence claims, because, in the former, "the evidence was available to the prosecutor and not submitted to the defense," while in the latter it was to be "found in a neutral source." 427 U.S. at 111 (emphasis added). By losing sight of its context, the First Circuit erroneously focused only on the reference to evidence which is to be "found in a neutral source." In fact, the Agurs Court was distinguishing cases in which the prosecution does possess the information, in which event Brady applies, from those in which the prosecution does not possesses the information and the defendant "found [it] in a neutral source," in which case the standard for newly discovered evidence applies. Id. at 111-12. Thus, the significance of the distinction was that the evidence was known by the prosecutor, in the first instance, but was known by neither party in the second, not simply that it was "found in a neutral source" irrespective of the prosecutor's knowledge. This Court, after all did not say that Brady applied where the evidence "was not available to the defense," but where it was not "submitted to the defense."

It is clear, therefore, that this Court in Agurs never intended to create an exception to the prosecution's duty of disclosure. Indeed, while it has refused to abandon the "due diligence" requirement altogether, the Ninth Circuit, like the Seventh, has correctly recognized that the proposition that there should be no such requirement in the Brady context "draws some support" from Agurs. Shelton, 588 F.2d at 1250. *Accord*, Hedgeman, 564 F.2d at 768.

The putative "due diligence" exception, which negates the duty to disclose exculpatory evidence when such evidence is otherwise "available" to the defense, is, at its core, inconsistent with the logic, principles and resolutions of this Court's Brady jurisprudence. In Bagley, the Court noted that:

> [A]n incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist.

473 U.S. at 682. The Court also indicated that defense counsel could reasonably rely on such

nondisclosure for "pretrial and trial decisions on the basis of [the] assumption" that such evidence does not exist. Rather than concluding that the failure of defense counsel to investigate further or to make further discovery motions absolved the government of responsibility for its nondisclosure, as the Fourth Circuit's decision in Strickler plainly does, the Court actually noted that the government's sin would be that much greater, as it would be responsible for 'impairing' the defense by misleading it. Id. at 682-83. *Cf.* Wood v. Bartholomew, 116 S.Ct. 7 (1995)(no violation where defense counsel testified he would not have used the evidence in any event). Strickler's counsel was misled both at trial and in state habeas by the Commonwealth's representations that all Brady material had been disclosed to the defense in the prosecutor's open file.

In Moore v. Illinois, 408 U.S. 786 (1972), the defense complained that the prosecution did not provide the out of court statement of a witness to the police, although the defense had not asked the witness about the existence of such a statement. The defense asked two other witnesses about the existence of such statements and was provided the statements by the prosecutor. While the Court ultimately held that the undisclosed statement was not material, it did not suggest that the failure of defense counsel to inquire about it negated any duty to disclose that would otherwise have existed, even though the statements of the other witnesses had been produced in response to defense inquiry. Id. at 794-97.

The "due diligence" exception is also, as a practical matter, fundamentally inconsistent with the analysis applicable to such claims. In Kyles, the Court held that the materiality of the evidence and, thus, the duty to disclose, must be considered collectively. 115 S.Ct. at 1567.

> [T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.

Id. If the due diligence exception exists, the prosecution, in determining what it must disclose, must

also be "assigned the ... responsibility" to take into account what portion of that evidence defense counsel could find himself. This would add a new and particularly speculative element to the government's calculus, enabling the prosecutor, and ultimately requiring a reviewing court, to first identify which items of evidence counsel could have found -- by whatever standard that is to be judged -- and then to analyze the collective impact of only that evidence which counsel could not have found.

This exercise would be largely impossible for the prosecutor to perform, particularly when, as here, the exception is unlimited in its potential application. The prosecutor does not know what efforts counsel has made to locate the evidence, whether witnesses have refused or failed to divulge the information known to the prosecution (as happened here), or whether other obstacles have prevented counsel from discovering the evidence he seeks. Yet without such knowledge, the prosecutor can not assess the scope of his constitutional obligation. Thus, the "due diligence" exception adds a particularly troublesome layer of uncertainty to the Brady equation; the prosecutor must judge not only whether the evidence is "favorable," Kyles, 115 S.Ct. at 1568, but, if so, whether counsel is chargeable with its discovery.

The "due diligence" exception subverts the essential premise of Kyles and its precursors that the duty to disclose favorable evidence

> serve[s] to justify trust in the prosecutor as "the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 [] (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. [Cite omitted].

Kyles, 115 S.Ct. at 1568. The exception accomplishes exactly what the Court warned against in Kyles, but to a degree not even contemplated there: the descent of the "adversary system of prosecution ... to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of

truth." 115 S.Ct. at 1568.

It certainly accomplished that here. The prosecutor was responsible for production of the Stoltzfus documents even though he had no personal knowledge of five of the eight documents. However, the prosecutor knew other jurisdictions had been involved in the investigation. JA 1255. A prosecutor cannot insulate himself from material that might prove detrimental to his case. "[The individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Kyles at 1567. The prosecutor's good faith or bad faith in failing to reveal exculpatory or impeachment material is irrelevant. Id. See Smith v. Secretary Dept. of Corrections, 50 F.3d 801 (10th Cir.), cert. denied, 116 S. Ct. 272 (1995)(granting the writ based on a Brady violation where two counties conducted murder investigation, prosecutor had an "open file," but critical material from one county was not therein). Moreover, the prosecutor affirmatively represented to the defense that all Brady material was contained in the "open file," and in state habeas, the Commonwealth repeated that representation.

Nevertheless, the Commonwealth's wrongful conduct has been excused, and Strickler is to be executed, because the Court of Appeals has speculated that state habeas counsel should have filed a discovery motion for which he had no factual or legal basis and then further speculated that such a motion would have been granted, resulting in the production of the Stoltzfus documents.

B. The Standard Adopted By The Fourth Circuit By Which Due Diligence Must Be Assessed Is Incompatible With The Requirement Of Disclosure.

Assuming a "due diligence" exception to the duty of disclosure does exist, the Court of Appeals adopted in this case a novel standard that swallows the constitutional rule. The Court found that "the Brady claim was available to [Strickler] in state court through the exercise of reasonable diligence." App. A at 21-22. "Reasonable diligence" requires counsel to engage in a "fishing expedition" for privileged documents with no factual or legal basis to support his discovery motion

despite the state's repeated representation that all Brady material had been disclosed. The Court then assumes this motion would have been granted, although it can cite no authority in support, and would never have granted such a motion itself.

The standard adopted by the Fourth Circuit eliminates any incentive for disclosure, in plain conflict with the policies underlying this Court's decisions. In Kyles, the Court extolled the virtues of disclosure and adopted a standard designed to encourage "[t]he prudence of the careful prosecutor." 115 S.Ct. at 1569. The Fourth Circuit standard, on the other hand, offers virtual immunity to prosecutors, by shielding their decisions not to disclose exculpatory information, except where a defendant not only discovers the evidence post-trial and demonstrates its materiality, but also avoids a post-hoc reconstruction of how, in theory, his counsel might have been more diligent and might, if he were able to persuade a state court to permit a "fishing expedition" through privileged police and prosecution files, have discovered the evidence to which he was entitled all along. "A conviction obtained while defense counsel is ignorant of important potentially exculpatory evidence cannot be upheld merely because 'more able, diligent, or fortunate counsel might possibly have come upon the evidence on his own.'" Agurs, 510 F.2d at 1253, *quoting*, Levin, 363 F.2d at 291.

The facts in both Bagley and Kyles demonstrate the error in the Court of Appeals' holding. In Bagley, this Court found a due process violation based upon the failure to disclose a monetary inducement even though counsel "was free to cross-examine the witnesses on any relevant subject, including possible bias or interest resulting from inducements made by the Government." 473 U.S. at 678. The Court did not even suggest that the failure to inquire on the issue of bias excused the prosecutor's nondisclosure.

In Kyles, each witness was known to the defense, having testified at Kyles' first trial. Counsel plainly could have asked each whether he had given a statement to the police. Neither the

majority nor the dissent excused the State's failure to disclose prior inconsistent statements based upon counsel's failure to inquire about them, either pre-trial or during either of Kyles' trials. The Fourth Circuit, however, plainly would excuse the nondisclosure in Kyles based upon counsel's failure to inquire "diligently" as to these matters. The Fourth Circuit's decision is not only inconsistent with this Court's Brady jurisprudence, it is inconsistent with both the decisions of other circuits applying a "due diligence" exception and even its own prior decisions. In no other case has a Court of Appeals, including the Fourth Circuit until now, applied that exception when the prosecution represented both at trial and in state habeas that all Brady material had been disclosed to the defense through the prosecutor's "open file" and where the relevant witness's trial testimony contained no clue that interviews and materials contradicting her trial testimony had been given to the police.

Prior to the decision in Strickler's case, the Court recited fundamentally inconsistent standards for application of the "due diligence" exception. In Stockton v. Murray, 41 F.3d 920, 927 (1994), the Court held that there is no prosecutorial duty to disclose evidence where the defense "sit[s] idly by," rather than pursuing allegedly exculpatory information about which it actually knew -- a rule akin to that of the Second Circuit. Similarly, in United States v. Wilson, 901 F.2d 378, 381 (1990), the Court held that the duty to disclose does not exist "where the exculpatory evidence is not only available to the defendant but also lies in a source where a reasonable defendant would have looked...," (emphasis added), a standard by which the result in Strickler's case could not have been reached. Moreover, in United States v. Kelly 35 F.3d 929, 934-37 (1994), the Court found there was a due process violation where the prosecutor suppressed a letter written by a primary prosecution witness as well as a search warrant affidavit containing impeachment material about the same witness. The Court rejected the argument that the evidence was available to the defense with

reasonable diligence where it was held in nonpublic government files during the trial.

On the other hand, in Barnes v. Thompson, 58 F.3d 971 (4th Cir. 1995) and Epperly v. Booker, 997 F.2d 1 (4th Cir. 1993), the Court applied the exception somewhat more broadly than in Stockton and Wilson, and far more broadly than in Kelly, holding counsel in Barnes responsible for knowledge adduced at the trial of a co-defendant, 58 F.3d at 975-77 (*citing*, Lugo, *supra*), and, in Epperly, excusing the nondisclosure of procedures for the use of search dogs because they could have been obtained through discovery, independent expert testimony, or cross-examination of the government's expert. 997 F.2d at 9.

Until Strickler, the Fourth Circuit had held that a habeas petitioner failed to establish cause for default only if the undisclosed Brady material was available in the public forum. In Hoke v. Netherland, 92 F.3d 1350 (4th Cir. 1996), a Virginia capital case, the Commonwealth failed to reveal police interviews with the victim's sexual partners, none of whom were trial witnesses and hence were unknown to the defense, concerning the victim's sexual practices. Police interviews with the victim's partners revealed that the victim's sexual practices were consistent with Hoke's account of his sexual encounter with the victim. The undisclosed interviews supported Hoke's defense, i.e., that the victim had suggested and voluntarily engaged in vaginal and anal sex. The Fourth Circuit excused the prosecutor's failure to disclose the exculpatory evidence gathered by the police because defense counsel failed to conduct "a reasonable and diligent" investigation. Defense counsel had made several unsuccessful efforts to locate the victim's sexual partners and was met with hostility and resistance. Nevertheless, the Court speculated that if Hoke's attorney had found and interviewed the same partners, they would have made the same admissions to him. Id. at 1355. Strickler goes well beyond the decision in Hoke. The Court had never before held that nonpublic, police documents were reasonably available to defense counsel, who had no clue as to their contents.

In contrast, the other Circuit Courts have limited application of the due diligence exception to cases in which the information is known by the defense, is contained in the public record, or could have been readily obtained from sources or witnesses known to the defense.[6] Each Court of

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[6] First Circuit: Lugo v. Munoz, *supra*, (no Brady violation as evidence was in the "public record," 882 F.2d at 9-10) [citing United States v. Sobien, 301 F.2d 236, 241-42 (2nd Cir. 1961), *cert. den.*, 82 S.Ct. 1585 (1962)(defendant had actual knowledge of evidence claimed to have not been disclosed)]. United States v. Hicks, 848 F.2d 1, 4 (1st Cir. 1988), described the holding in Lugo as the "government has no Brady burden when facts are readily available to the defense." (emphasis added). The government may fulfill its Brady obligation by identifying potentially exculpatory witnesses and informing the defendant of their role in the allegations, but if the defendant can not gain access to the witness, the government must provide evidence itself.

Second Circuit: The exception applies where the defendant had actual knowledge of the relevant witness and/or the essential facts, and simply failed to follow up on that information. *See* Williams v. United States, 503 F.2d 995, 998 (2nd Cir. 1974); United States v. Bermudez, 526 F.2d 89, 100 (2nd Cir. 1975); United States v. Esposito, 834 F.2d 272, 275-76 (1987). In Payne, supra, 63 F.3d at 1209, Brady violation found where defense was unaware of facts needed to discover an affidavit in the public record.

Third Circuit: Court refused to apply the exception in United States v. Perdomo, *supra*, and found a Brady violation based upon failure to disclose the criminal records of witness, although the Office of the Public Defender, which represented the defendant, had previously represented that witness. "[C]ounsel did not have knowledge, or more importantly, any responsibility to be aware of the witness' criminal record." 929 F.2d at 969. The Third Circuit held that the exception applies "if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." Id. at 973 (emphasis added).

Fifth Circuit: The Court has consistently applied the exception if the defense had full or equal access to the information. United States v. Ramirez, 810 F.2d 1338, 1343 (5th Cir. 1987); Williams v. Scott, 35 F.3d 159, 163 (5th Cir. 1994), *cert. den.*, 115 S.Ct. 959 (1995); United States v. Prior, 546 F.2d 1254, 1259 (5th Cir. 1977); United States v. McKenzie, 768 F.2d 602, 608 (5th Cir. 1985); United States v. Milstead, 671 F.2d 950, 953 (5th Cir. 1982); United States v. Bi-Co Pavers, Inc. 741 F.2d 730, 736 (5th Cir. 1984). The applicable standard for analyzing the performance of defense in this context is whether counsel exercised "*any* reasonable diligence." United States v. Prior, *supra*; United States v. Bi-Co Pavers, Inc, *supra*.

Sixth Circuit: United States v. Todd, supra, 920 F.2d 399, 405 (no Brady violation when the defendant is made aware "of the essential facts that would enable him to take advantage of the exculpatory evidence").

Seventh Circuit: As noted earlier, the Court has applied the exception with great restraint. The Court found a Brady violation, and condemned the prosecutor's conduct as "indefensible," where he failed to disclose a witness' recantation of her inculpatory statements against the defendant, even though defense counsel had access to the witness and "knew full well what [she] was telling the prosecution all along,...." Mustread v. Gilmore, 966 F.2d 1148, 1152 (7th Cir. 1992). See United States v. White, 970 F.2d 328, 337 (7th Cir. 1992)(no duty of disclosure when the information is "fully available" to the defense); Morris, supra, 80 F.3d at 1169-70 (no Brady violation as defense actually possessed some of the disputed documents and had equal access to those documents in the possession of other government agencies).

Eighth Circuit: United States v. Davis, 785 F.2d 610, 618 (8th Cir. 1986)(no Brady violation when information contained in a medical report was actually in the defendant's possession and government need not explain the meaning of the report).

Appeals which has applied the "due diligence" exception, by whatever standard, except the Fourth Circuit, has limited it to circumstances where the Court could determine what counsel alone would have found had diligence been exercised, not, as here, what he might have found had a lower court intervened and granted a discovery motion for which there was no known factual or legal basis. Consequently, not in a single one of these cases, or in any other of which petitioner is aware, has a Court of Appeals excused the government's failure to disclose exculpatory evidence where, as here, the existence of the evidence was unknown to the defense, much less when, the government repeatedly represented that all such evidence had been produced.

However, in the Fourth Circuit, under the rule of this case, prosecutorial suppression of exculpatory evidence is to be accepted even when the defense could not have obtained the evidence through its own efforts and even when it is only theoretically possible that the defense could have obtained the evidence through court intervention. *Cf., e.g.*, Hicks, 848 F.2d at 4 (if defendant

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Ninth Circuit: In Shelton, *supra*, the Court acknowledged that Agurs lent support to the proposition that the due diligence exception should not apply to Brady claims. 588 F.2d at 1250. The Court, adopting a standard of "any reasonable diligence," concluded that there was no Brady violation because the witness and the value of his testimony were known to defense, and there was no indication that the defense had difficulty locating him. Id.

Tenth Circuit: The Court has categorically rejected any exception to the State's duty of disclosure based upon the asserted lack of diligence by the defense. Banks, supra, 54 F.3d at 1517.

Eleventh Circuit: Like the Fifth and Ninth Circuits, the Eleventh has adopted an "any reasonable diligence" standard. United States v. Meros, 886 F.2d 1304, 1309 (11th Cir. 1989); Valera, supra, 845 F.2d at 928, *citing* United States v. Prior, *supra*; Routly v. Singletary, 33 F.3d 1279, 1285 (11th Cir. 1994). In each case, nondisclosure was tolerated because the defense demonstrably would have found the evidence had it exercised even minimal effort, i.e., "*any* reasonable diligence." See also United States v. Spagnuolo, 960 F.2d 991, 994 (11th Cir. 1992)(Brady violation where "neither [defendant] nor his lawyer knew before trial about the favorable information in order to make an effort to obtain its production." Id. Thus, to excuse nondisclosure, the Eleventh Circuit requires that the defendant actually know about the exculpatory evidence and where to find it, unlike the Fourth Circuit.

District of Columbia Circuit: The Court, even before Brady, has rejected the notion that the duty of disclosure is limited by any defense obligation to exercise "due diligence." Levin, 363 F.2d at 291 Agurs, 510 F.2d at 1253; Marshall v. United States, 436 F.2d at 159 & n.11.

cannot gain access to witness, government must provide exculpatory evidence).

If there is to be a "due diligence" exception to the State's duty of disclosure, it must be limited to instances in which the information is actually known by the defense, or demonstrably *could* have been obtained from sources or witnesses known and available to the defense that counsel had specific reason to investigate. Nondisclosure should not be excused where, as here, counsel has unquestionably exercised "some diligence" in attempting to obtain the information. *See, e.g.*, Shelton, 588 F.2d at 1250; Prior, 546 F.2d at 1259 (5th Cir. 1977); Stockton v. Murray, *supra* (defendant can not "sit idly by"). Any other rule is simply inconsistent with the prosecution's underlying Due Process duty.

C. If The Exception Exists, The Burden Must Be On The State To Demonstrate That Counsel Would Necessarily Have Discovered The Exculpatory Evidence Through The Exercise Of Due Diligence.

Having extended the "due diligence" exception into state habeas, the Court of Appeals then imposed on petitioner the virtually impossible burden of proving the negative, i.e., that counsel could not have discovered the evidence.[7] The Fourth Circuit explained its reasoning as follows:

> On state habeas, Strickler did assert an ineffective assistance of counsel claim based on counsels' failure to file a Brady motion, although it is unclear from the record what formed the factual basis for this claim. The Commonwealth opposed the motion on the basis that Strickler received all Brady material through the prosecutor's open file policy. However, Strickler did not request to examine the police files of the Harrisonburg Police Department, notwithstanding Stoltzfus' trial testimony that she was interviewed by Detective Claytor on several occasions and Virginia Supreme Court Rule 4:1(b)(5) which allows, with prior leave of court, discovery on all relevant matters that are not privileged.

Slip op. at 16. Based on the erroneous factual assumptions and incorrect legal conclusions incorporated in this passage, the Court concluded that Strickler had not demonstrated reasonable

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[7] The Eleventh Circuit also has placed the burden of disproving the possibility that the defense could have found the evidence on the defendant. *See, e.g.*, Meros, 886 F.2d at 1308; Spagnuolo, 960 F.2d at 994. No other circuit appears to have done so.

diligence and, therefore, cause for default in state court.

First, although Stoltzfus testified that she was interviewed by Claytor on several occasions, nothing in her trial testimony revealed that she had given contradictory and inconsistent statements about the events she had "witnessed." Strickler's trial counsel and his state habeas counsel had no notice that prior inconsistent or exculpatory statements existed that were discoverable under Brady but had not been disclosed. The Court's opinion does not disagree and does not point to anything in Stoltzfus' testimony that would have alerted Strickler's counsel to undisclosed impeachment material.

Second, as the Commonwealth affirmatively and erroneously represented that all Brady material had been disclosed through the prosecutor's "open file," Strickler's counsel had no factual basis to argue to the trial court or to the state habeas court that discoverable statements had not been disclosed. The Court's opinion does not disagree and does not point to anything in the state record that would have supported a discovery motion.

Third, under Brady, Bagley, and Kyles, the state has an affirmative obligation to disclose all favorable evidence in its possession, including exculpatory and impeachment evidence, even without a specific request by the defendant. This obligation does not end with the trial. Kyles at 1567-68; Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992)(Brady obligation continues throughout federal habeas proceedings); see also, Imbler v. Pachtman, 424 U.S. 409, 427 n. 25 (1976). The Fourth Circuit is shamefully silent both as to the Commonwealth's undisputed constitutional obligation and the Commonwealth's undisputed violation of this constitutional obligation.

Fourth, the converse of Brady is that the state has no obligation to disclose consistent, inculpatory witness statements in the exclusive possession of the state. Moreover, under Virginia law, disclosure of all witness statements to Commonwealth agents is prohibited unless those

statements constitute Brady material[5]. The opinion fails to acknowledge these state law prohibitions on disclosure of investigative and prosecution files.

Fifth, the Court opinion speculated that Strickler could have obtained copies of the Stoltzfus documents in the Harrisonburg police files by a motion to the state habeas court invoking Virginia Supreme Court Rule 4:1(b)(5). That rule states in relevant part:

> (5) Limitations on Discovery in Certain Proceedings. In any proceeding . . . (3) for a writ of habeas corpus or in the nature of coram nobis; (a) the scope of discovery shall extend only to matters which are relevant to the issues in the proceeding and which are not privileged; and (b) no discovery shall be allowed in any proceeding for a writ of habeas corpus . . . without prior leave of the court, which may deny or limit discovery in any such proceeding.

The Court cited no Virginia case or authority to support its conclusion that Strickler would have been granted discovery of the police files if he had made such a motion given the facts of his case. In fact, the Commonwealth had never advanced this argument in the district court or on appeal. It was raised sua sponte by the Fourth Circuit, and Strickler had no opportunity to respond.

The Court erred in its interpretation of state Rule 4:1(b)(5). The police files were privileged and clearly exempt under the language of the Rule itself. See Howard v. Warden, 348 S.E.2d 211, 212 (Va. 1986)(noting circuit court decision that police department files are privileged and not open for examination even when state habeas petition alleges Brady violation and petitioner moves for discovery). Moreover, Strickler could not demonstrate "relevance" or "good cause" or any factual basis for a discovery motion since the Commonwealth repeatedly stated that all required disclosures had been made prior to trial. See Rakes v. Fulcher, 210 Va. 542, 172 S.E.2d 751 (1970)(good

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[5] Rule 3A:11(b)(2) of the Rules of the Supreme Court of Virginia specifically denies pretrial "discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal documents made by agents in connection with the investigation or prosecution of the case," except for the defendant's own statements and forensic reports. Virginia Code sections 15.2-1722 and 2.1-342(B)(1) prohibit disclosure of memoranda, correspondence, evidence, investigative reports, and complaints held in police files.

cause must be demonstrated for discovery). There is no right to discovery in state habeas. Yeatts v. Murray, 455 S.E.2d 18, 21 (Va. 1995). Thus, the Fourth Circuit erred in concluding that as a matter of Virginia state law the police files were available to Strickler through reasonable diligence.

The Court of Appeals effectively placed on Strickler the duty to prove that his counsel could not have obtained the evidence either by himself or through court intervention. This allocation of the burden of proof frustrates the purpose of Brady and its progeny, since it is always possible to hypothesize some method by which the evidence could have been uncovered. In theory, the defendant in most instances--though not in this case--could have done whatever the police did to discover the evidence. The policy considerations set forth in Kyles demand that, if the prosecutor chooses to "tack[] too close to the wind," 115 S.Ct. at 1568, by not disclosing exculpatory evidence on the theory that counsel might be able to discover it himself, the State should bear the burden of proving that counsel was constitutionally ineffective. The State must prove that counsel's failure to undertake the investigation required to uncover the evidence constituted ineffective assistance of counsel and that, had he not been ineffective, counsel would have discovered that evidence. *See*, Strickland v. Washington, 466 U.S. 668, 688 (1984).

Whatever the contours of the exception are, it is an affirmative defense of the State, not an element of the petitioner's claim, and the burden must be on the State to prove its applicability in any given case. Indeed, it is revealing that the Eleventh Circuit, the only other Circuit to clearly place the burden on petitioners in this context, has restated the elements of a Brady claim to be that the defendant must prove, in addition to possession of favorable evidence and its suppression by the government, and the materiality of that evidence, "that the defendant does not possess the evidence, nor could he obtain it himself with any reasonable diligence." Meros, 866 F.2d at 1308 (emphasis added). By contrast, this Court has stated that all that is required for such a claim is (1) that the

evidence be possessed and suppressed by the government, and (2) that it is material either to guilt or to punishment. Agurs, 427 U.S. at 104 n.10, 111; Kyles, 115 S.Ct. at 1565. Placing the burden of disproving the discoverability of the evidence on the petitioner, especially in combination with the level of diligence demanded by the Fourth Circuit (which is now higher than the standard applied by the Eleventh Circuit), and its willingness to speculate about the potential fruits of that diligence, dooms Brady and its progeny to oblivion.

In addition, the Fourth Circuit's decision conflicts with clear and long established decisions of this Court on procedural default. Cause excusing procedural default typically "requires a showing of some external impediment preventing counsel from constructing or raising the claim." Coleman v. Thompson, 501 U.S. 722, 753 (1991), quoting Murray v. Carrier, 477 U.S. 478, 488 (1986). This Court has held that interference by the state constitutes cause excusing a petitioner's failure to present a constitutional claim in state court. See Amadeo v. Zant, 486 U.S. 214, 222 (1988)(cause is present where evidence revealing violation "was concealed by county officials and therefore was not reasonably available to petitioner's lawyers"); Dobbs v. Zant, 113 S. Ct. 835, 836 (1993)(petitioner permitted to rely on transcript not previously discovered or asserted as basis for relief because "delay [in discovering transcript] resulted substantially from the State's own erroneous assertions that closing arguments had not been transcribed" and because petitioner properly relied on state's assertions). Strickler has demonstrated cause based on the state's uncontested, continuous suppression of the Stoltzfus documents throughout state court proceedings coupled with the state's repeated, erroneous representations that all Brady materials had been produced to Strickler's attorneys. The Fourth Circuit opinion obliterates the doctrine of cause excusing default and violates long established law.

D. The Suppressed Evidence And False Testimony Were Unquestionably Material And Required Affirmance Of The District Court Decision.

As an alternative ground for its decision, the Court of Appeals stated that the suppressed evidence was not material. This is a matter of law and, particularly in light of the other flaws in this capital case, should be reviewed here. *See*, Kyles, 115 S.Ct. at 1576 (Stevens, J., concurring). "In our view, the Stolzfus [sic] materials would have provided little or no help to Strickler in either the guilt or sentencing phases of the trial. During either phase, Strickler never contested that he abducted and robbed Whitlock." App. A at 24. This was error for several reasons.

Strickler's capital murder conviction was based on the predicate offenses of abduction with intent to defile and armed robbery.[9] Stoltzfus provided the only eyewitness testimony to the abduction in the mall parking lot and the only testimony that Strickler was armed during that abduction. The Commonwealth argued on summation that Stoltzfus' testimony conclusively proved these two predicate offenses. JA. 432, 437-439. However, the Court incorrectly assumed that abduction and simple robbery were valid capital predicates. App. A at 24. They are not.

Stoltzfus' testimony was essential to the armed robbery predicate. The prosecutor argued that Strickler had a knife and that he held it against the victim as she drove out of the mall:

> [Whitlock] looked at [Stoltzfus] and then looked down again. Why was that? I suggest to you that this man had a knife. He had the knife that he carries with him all the time. He had a knife later on with him in the car. That was pressed right up against Leanne . . . Ms. Stolzfus [sic] positively identified Mr. Strickler as the man who first got into the car. The man who struck Leanne Whitlock both times, the man that sat right beside her when she was forced to drive off. It was him, the evidence show it was him.

[9] Strickler was never charged with rape, and the prosecutor admitted that there was no proof Strickler had raped the victim. JA. 432.

Strickler was never indicted or arraigned on armed robbery as a predicate to capital murder. The indictment stated only robbery which was not a capital predicate. JA 24. The court sua sponte charged armed robbery but never instructed the jury on the elements of armed robbery. JA 428-29.

JA. 438-39 (emphasis added). However, in her very first statement to the police, Stoltzfus was unable to identify Strickler or provide any description of him or his clothing. JA 1031. Defense counsel could not challenge Stoltzfus because the police suppressed her prior inconsistent and contradictory statements. Strickler was deprived of an opportunity to effectively defend against the armed robbery predicate.

The remaining capital predicate was invalid. In state habeas, the Virginia Supreme Court held that Strickler's jury had been erroneously charged on abduction with intent to defile. Strickler v. Murray, 452 S.E.2d 648 (Va. 1995). The statute at the time of Strickler's trial applied only when the victim was under 12 years of age. Strickler's defense counsel was ineffective and failed to object to the jury instruction on the abduction predicate. However, the state habeas court upheld the conviction based on evidence of armed robbery. Yet all evidence of armed robbery came from Stoltzfus' testimony. Strickler was unable to defend against this charge because the Stoltzfus materials were suppressed.

The Fourth Circuit made no mention of the invalid abduction predicate and ignored the evidence of armed robbery based on Stoltzfus' testimony. As a result, the Court wrongly concluded that Strickler could not demonstrate prejudice. However, if Stoltzfus had been properly impeached based on her own prior statements, the jury would have had a reasonable doubt about both the armed robbery and the abduction. That doubt could have resulted in an acquittal on the capital murder charge and a conviction on a lesser offense, as occurred with Strickler's co-defendant at his separate trial. In Strickler's trial, the jury also had been charged on the lesser offense of first degree murder.

The Stoltzfus documents were material for another reason that was never addressed by the Fourth Circuit. Stoltzfus portrayed Strickler as the only one who committed violent acts against Whitlock. Stoltzfus said Strickler forced Whitlock's car door open and stuck her repeatedly on the

head and shoulder. Stoltzfus described Strickler as the revved up "Mountain Man" but portrayed Henderson as "Shy Guy," a passive follower. The prosecutor used Stoltzfus' testimony to argue that Strickler was the instigator and leader in Whitlock's abduction and, by inference, in her murder. Without Stoltzfus' testimony the jurors would have been reduced to speculation about Strickler's participation in the crimes charged. It was not irrelevant to his conviction.

In addition, substantial evidence pointed to Henderson, rather than Strickler, as the one responsible for Whitlock's murder. On the night of the murder, Henderson told a friend he had killed an unidentified "nigger" and that friend saw blood on Henderson's clothes. JA 384. Henderson's wallet was found in the vicinity of Whitlock's body. JA 176-77. On the night of Whitlock's disappearance, Henderson (not Strickler) gave her watch to an woman in a bar. JA 157. Thus, successful impeachment of Stoltzfus would have created substantial doubt about Strickler's role and participation in Whitlock's murder. Defense counsel could have successfully focused his trial strategy on minimizing Strickler's involvement where substantial evidence had been presented against Henderson.

> This Court reiterated the established prejudice standard in Kyles, 115 S. Ct. at 1565:
>
> [F]avorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

(Citing United States v. Bagley, 473 U.S. at 682, 685.) In Kyles the Supreme Court emphasized that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence could have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)." Id. at 1566. Materiality is not a sufficiency of the evidence test, as the Fourth Circuit erroneously held. App. A at 24.

Strickler's trial was fundamentally unfair and unreliable. The suppressed evidence "undermines confidence in the outcome of the trial." Bagley, 473 U.S. at 678. Disclosure of the Stoltzfus documents could have resulted in conviction of a noncapital, lesser offense.

CONCLUSION

For all the foregoing reasons, a petition for a writ of certiorari should be granted.

TOMMY DAVID STRICKLER

By: _____
Counsel

Barbara L. Hartung, VSB #38062
(Counsel of Record)
1001 East Main Street, #504
Richmond, Virginia 23219
(804) 649-1088

Mark E. Olive, Esq.
Virginia Capital Representation
Resource Center
1001 East Main Street, #510
Richmond, Virginia 23219
(804) 643-6845

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